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No. 92-746

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARTIN J. HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a 1984 amendment to the Labor-Management Reporting and Disclosure Act of 1959, which imposed a 13-year disqualification from serving as a union official on any union employee convicted of a felony involving the misuse of his position to obtain a gain at the expense of the union, violates the Ex Post Facto Clause of the Constitution as applied to a union employee who committed the disqualifying felony before the effective date of the amendment.

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OPINIONS BELOW

The opinion of the court of appeals on appeal from petitioner's resentencing (Pet. App. A2-A17) is reported at 964 F.2d 536. The opinion of the court of appeals on petitioner's initial appeal (Pet. App. A38-A50) is reported at 899 F.2d 1495.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on May 13, 1992. A petition for rehearing was denied on July 30, 1992 (Pet. App. A86-A87). The petition for a writ of certiorari was filed on October 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on ten counts of falsification of union records, in violation of 29 U.S.C. 439(c); two counts of filing false W-2 and W-3 forms with the Internal Revenue Service (IRS), in violation of 26 U.S.C. 7206(2); and two counts of making false statements to the United States through the submission of false labor reporting documents, in violation of 18 U.S.C. 1001. Following the verdict, the district court granted petitioner's motion for a judgment of acquittal on the two Section 1001 counts. Petitioner was sentenced to two years' probation on the tax counts and fined $10,000 on the ten counts of falsifying union records. In addition, petitioner was subject to an employment disability under 29 U.S.C. 504(a), barring him from representing or serving as an officer of the Communication Workers of America for three years. Pet. App. A22-A23, A39-A41.

On appeal, the court of appeals reinstated the two Section 1001 convictions and ordered the district court to reduce the felony conviction on one of the tax counts to a misdemeanor. Pet. App. A41-A45, A47-A48. Thereafter, petitioner sought a writ of certiorari from this Court, and the Court denied the writ. 111 S. Ct. 508 (1990). On resentencing, the district court sentenced petitioner to an additional three years' probation on the Section 1001 counts and increased his employment disability from three to 13 years. Pet. App. A34-A35. The court of appeals affirmed. *Id.* at A17.

1. The evidence at trial showed that petitioner was a manager of a branch office of the Communication Workers of America (CWA). In that capacity, he submitted office expense vouchers to the CWA that falsely claimed reimbursement for mileage and meal expenses for union employees. The CWA paid him nearly $400,000 in reimbursement funds, which he used to make political contributions and to pay salaries at the United Telephone Credit Union (UTCU). Pet. App. A39-A40. In addition, petitioner caused the CWA to file reports with the Department of Labor falsely representing Gay Griffith to be a CWA employee who received $7,995 in 1982 and $10,540 in 1983 as reimbursement for expenses. In fact, Griffith, the manager of the UTCU, received those amounts as salary from funds generated by the false expense vouchers filed at the direction of petitioner. *Id.* at A42-A43. Petitioner also caused the CWA to file false W-2 and W-3 forms for Griffith with the IRS. *Id.* at A45, A47.

2. Petitioner was convicted on the Section 1001 counts in November 1987. The convictions were based on conduct occurring in 1982 and 1983. At the time of petitioner's criminal activity, Section 504(a) of the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 536-537 (codified at 29 U.S.C. 504(a) (1982)), prohibited persons convicted of certain specified criminal offenses from engaging in union activities for five years after their term of imprisonment ended.[1] In 1982 and 1983, however,

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[1] Section 504(a) provided in relevant part:

> No person who is or has been a member of the Communist Party or who has been convicted of, or served any part

Section 1001 offenses were not among the crimes giving rise to the disability. Pet. App. A8-A9.

In 1984, Congress amended the Act by adding to the offenses giving rise to the disability "any felony involving abuse or misuse of [a] person's position or employment in a labor organization * * * to seek or obtain an illegal gain at the expense of the members of the labor organization." Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 803, 98 Stat. 2133. See 29 U.S.C. 504(a). That language subjects persons who are found guilty of violating Section 1001 to the disability when, as here, the violation of Section 1001 is part of a scheme to obtain union funds unlawfully. The amendment, which became effective on October 12, 1984, applies to any judgment of convic-

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> of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve--
>
> > (1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, * * *
> >
> > * * * * *
>
> during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment * * *.

29 U.S.C. 504(a) (1982).

tion entered after October 12, 1984, notwithstanding the date of the conduct that constituted the offense. Pub. L. No. 98-473, § 804, 98 Stat. 2134. See 29 U.S.C. 504(a) note.

3. On appeal, petitioner contended that application of the 1984 amendment to persons like himself whose false statements were made before the effective date of the 1984 amendment would violate the Ex Post Facto Clause of the Constitution, Art. I, § 9, Cl. 3. In rejecting that claim, the court of appeals concluded that the amendment did not designate punishment for past acts, but instead was "a legislative device aimed at strengthening regulations in an area susceptible to corruption." Pet. App. A9. The court relied on decisions of this Court that held similar forms of legislation to be non-penal, including *De Veau* v. *Braisted*, 363 U.S. 144 (1960); *Flemming* v. *Nestor*, 363 U.S. 603 (1960), and *Hawker* v. *New York*, 170 U.S. 189 (1898).

The court of appeals rejected petitioner's argument that this case was controlled by *United States* v. *Brown*, 381 U.S. 437 (1965). *Brown* held that another portion of Section 504(a), which disqualified members of the Communist Party from serving as officers or employees of a labor union, inflicted punishment within the meaning of the Bill of Attainder Clause of the Constitution. 381 U.S. at 458. The court of appeals observed that this Court's analysis in *Brown* "was pointedly aimed at remedying the legislative hysteria of the preceding decade, which had culminated in legislation explicitly targeting communists." Pet. App. A11. The court also noted that *Brown* addressed the Bill of Attainder Clause and "was not

intended as a disposition of an *ex post facto* challenge." Pet. App. A11. Finally, the court explained that, whereas the Court in *Brown* found that Congress intended the anti-communist provision of Section 504(a) to be penal in nature, the legislative history of the convicted felon provision indicates that it was not designed to inflict punishment, but rather to "protect union members and the public interest from further meddling by union officials who have been convicted for certain conduct." Pet. App. A11-A12. The court concluded that "it would be ill-advised to extend *Brown* so as to essentially overturn *De Veau*." Pet. App. A11.

ARGUMENT

Petitioner renews his contention that his employment disability under Section 504(a) violates the Ex Post Facto Clause because he committed the Section 1001 offenses before the effective date of the 1984 amendment of the statute.

1. The Ex Post Facto Clause provides that Congress may not "punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed." *Collins* v. *Youngblood*, 497 U.S. 37, 52 (1990); see *Dobbert* v. *Florida*, 432 U.S. 282, 292 (1977); *Beazell* v. *Ohio*, 269 U.S. 167, 169-170 (1925); *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Justice Chase). The purpose of the prohibition is "to assure that legislative Acts give fair warning of their effect and permit individuals to rely

on their meaning until explicitly changed." *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981).

Not every statute that brings adverse consequences to bear on an individual for previous conduct violates the Ex Post Facto Clause. The question in each case is "whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession." *De Veau* v. *Braisted*, 363 U.S. 144, 160 (1960). See also *Flemming* v. *Nestor*, 363 U.S. 603, 614 (1960) ("[w]here the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected"); *Hawker* v. *New York*, 170 U.S. 189, 200 (1898) ("such legislation is not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled").[2]

Thus, in *De Veau*, the petitioner challenged on ex post facto grounds the retroactive application of a New York statute that barred any person who had

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[2] In *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 475-476 (1977) (footnote and citations omitted), the Court held that determining whether a statute is a bill of attainder requires an analysis of "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers."

been convicted of a felony from holding office in any waterfront labor organization. This Court examined the statute's legislative history and determined that "New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony." 363 U.S. at 160. Because the purpose of the statute was regulatory rather than punitive, the Court held that its retroactive application did not violate the Ex Post Facto Clause. *Ibid.*[3]

Like the statute at issue in *De Veau*, the purpose of the 1984 amendment to Section 504(a) was not penal in nature. Rather, the amendment was designed "to afford unions * * * greater protection from corrupt union and management officials." S. Rep. No. 225, 98th Cong., 1st Sess. 297 (1983). As Sen. Hatch, one of the chief sponsors of the legislation, explained, "[t]he purpose of the retroactive provision * * * is not to inflict new punishment. It is intended to bring immediate relief to the union rank and file from abuse by convicted officials." 129 Cong. Rec. 16,371 (1983).[4]

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[3] Similarly, in *Flemming*, the Court held that a federal statute terminating social security benefits to an alien who was deported on certain specified grounds was not an ex post facto law, and in *Hawker*, the Court reached the same conclusion with respect to a New York statute prohibiting previously convicted felons from practicing medicine.

[4] Likewise, the legislative history of the 1959 Act indicates that the employment disqualification was

> not conceived by the committee as additional punishment for the crimes mentioned in the section. The punishment of these kinds of crimes and the enactment of laws relating

The legislative history of the 1984 amendment shows that, in providing that the amendment should apply retroactively, Congress was well aware of the prohibitions of the Ex Post Facto Clause, but concluded, chiefly on the authority of *De Veau*, that the statute "stands upon firm constitutional ground." 129 Cong. Rec. 16,372 (1983) (remarks of Sen. Nunn). See also *ibid.* (remarks of Sen. Nunn) ("the bill [does not] impose punishment for past acts in violation of the prohibition of ex post facto law"). In light of the regulatory purpose of the amendment, the court of appeals correctly concluded that "the disability imposed on [petitioner] is not an *ex post facto* imposition of punishment." Pet. App. A12. See *Postma* v. *International Bhd. of Teamsters, Local 294*, 337 F.2d 609 (2d Cir. 1964) (upholding retroactive application of the employment disability to convicted felons in the 1959 version of Section 504(a)).[5]

2. Petitioner's reliance (Pet. 10-11, 14-15) on *United States* v. *Brown*, 381 U.S. 437 (1965), is misplaced. In *Brown*, the Court held that the provision of

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> to them are and should be the province of the States. This provision is designed to further protect union members' and the public interest by establishing certain standards for persons holding union office.

S. Rep. No. 187, 86th Cong., 1st Sess. 49 (1959).

[5] Petitioner asserts that *Postma* is of no relevance because it was decided prior to this Court's decision in *Brown*. Pet. 14 n.4. *Postma*, however, was decided after this Court's decisions in *De Veau*, *Flemming*, and *Hawker*, and the Second Circuit in *Postma* expressly found *De Veau* to be "dispositive." 337 F.2d at 611. As argued below, there is no basis for concluding that this Court in *Brown* overruled *De Veau*, *Flemming*, and *Hawker sub silentio*. *Postma* thus remains good law.

Section 504(a) that makes it a crime for a former member of the Communist Party to hold union office was a bill of attainder. In so holding, the Court concluded that that provision "inflicts 'punishment' within the meaning of the Bill of Attainder Clause." 381 U.S. at 458. In petitioner's view, the Court's conclusion that the anti-communist provision of Section 504(a) "inflicts 'punishment' " for purposes of analyzing whether it is a bill of attainder establishes that the provisions of Section 504(a) imposing the same disability on the specified classes of convicted felons "make more burdensome the punishment for a crime," *Collins* v. *Youngblood*, 497 U.S. at 52, for purposes of ex post facto analysis.

Petitioner's view is mistaken. The Court in *Brown* relied on the fact that Congress "cannot specify the people upon whom the sanction it prescribes is to be levied," 381 U.S. at 461, and that Section 504(a)'s proscription on former communists "does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics * * * shall not hold union office." 381 U.S. at 450. In enacting the proscription on former communists, Congress failed to specify any acts or characteristics on the basis of which it intended to regulate union governance, but instead simply identified an organization whose members it sought to disable. In light of Congress's failure to articulate a regulatory objective, "it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers." *Nixon* v. *Administrator of General Services*, 433 U.S. at 476. Accordingly, the Court in *Brown* found

no need to discuss *De Veau*, *Flemming*, and *Hawker*, in all of which Congress had articulated a valid regulatory goal. See 381 U.S. at 452 n.26.

This case is governed by *De Veau*, *Flemming*, and *Hawker*, not by *Brown*. The portion of Section 504(a) at issue in this case *does* specify certain specific acts —the "misuse of [a] person's position or employment in a labor organization * * * to seek or obtain an illegal gain at the expense of the members of the labor organization," 29 U.S.C. 504(a)—whose commission would, in Congress's view, render the offender a threat to labor unions and their members. That determination was certainly not irrational, nor is there any basis to conclude that it was merely a pretext for the imposition of additional criminal punishment for previously committed offenses.[6]

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[6] The only source petitioner cites for the proposition that the disability at issue was intended to be penal in nature is a congressional report that, petitioner asserts, stated that the disability was imposed "to increase available penalties because the penalties used to protect labor relations had proven to be 'inadequate.'" Pet. 9-10. (Petitioner incorrectly cites H. Rep. No. 1030, 98th Cong., 2d Sess. 297-299 (1984). That report does not mention or discuss any of the provisions of the Comprehensive Crime Control Act of 1984. The correct citation is S. Rep. No. 225, 98th Cong., 1st Sess. 297 (1983), a Senate report on a precursor bill). The word petitioner quotes from the report is taken out of context from the following sentence: "Current Federal *prohibitions and* penalties designed to protect the legitimacy of labor relations have, in certain respects, proved to be inadequate." S. Rep. No. 225, *supra*, at 297 (emphasis added). That sentence generally explained a number of provisions of the Comprehensive Crime Control Act of 1984, including the amendment to Section 504(a). The disability imposed by Section 504(a) is a regulatory "prohibition * * *

Therefore, the portion of Section 504(a) at issue in this case is appropriately viewed as regulatory, not punitive.

3. Nor is petitioner helped by *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1867), or *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867), which he also cites. See Pet. 12-13. In those cases, the Court was confronted with challenges under the Ex Post Facto Clause to statutes excluding persons from practicing a profession based on conduct preceding the enactment of the statutes. The Court concluded in each case that the statute at issue violated the Ex Post Facto Clause, finding that the legislative purpose in enacting it was to inflict punishment for the past conduct. *Cummings*, 71 U.S. (4 Wall.) at 320, 327-329; *Gar-land*, 71 U.S. (4 Wall.) at 377-378, 380.

Hawker v. *New York* establishes that *Cummings* and *Garland* do not govern this case. In *Hawker*, the Court upheld the retroactive application of a New York statute making it a crime for a previously convicted felon to practice medicine. In reaching that conclusion, the Court reasoned that "[t]he State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character." 170 U.S. at 196. The Court distinguished *Cummings* and *Garland* on the ground that the statutes in those cases "were designed to deprive parties of their right to continue in their professions for past acts * * *, many of which had no bearing upon their fitness to continue in their professions." 170 U.S. at 198-199

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designed to protect the legitimacy of labor relations," not a "penalty."

(quoting *Dent* v. *West Virginia*, 129 U.S. 114, 128 (1889)). As we have shown, the 1984 amendment to Section 504(a) was of the regulatory type at issue in *Hawker*, not the punitive type at issue in *Cummings* and *Garland*.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Likewise unavailing is petitioner's reliance (Pet. 9, 14 n.4) on *United States* v. *Jalas*, 409 F.2d 358 (7th Cir. 1969). In that case, the court of appeals held that the government has no standing to seek an injunction barring a person disqualified under Section 504(a) from holding union office. The court explained that Section 504(a) is "a criminal statute contemplating proceeding by indictment or information." 409 F.2d at 360. The fact that it is a criminal offense to hold union office in violation of Section 504(a) has no bearing on whether the disqualification in Section 504(a) is a criminal punishment.